APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 8, 1998 Decided November 6, 1998

No. 97-5313

J.S.G. BOGGS,

Appellant,

v.

ROBERT E. RUBIN, SECRETARY OF THE TREASURY, *et al.*,

Appellees.

Appeal from the United States District Court
for the District of Columbia
(No. 93cv01845)

Before: GINSBURG, SENTELLE and ROGERS, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* SENTELLE.

Separate opinion, concurring in part and dissenting in part, filed by *Circuit Judge* ROGERS.

SENTELLE, *Circuit Judge:* Appellant J.S.G. Boggs, who describes himself as an internationally-recognized artist, creates images of currency which he uses in transactions designed to explore the meaning and value of money. He appeals from a district court grant of summary judgment

ruling that his reproductions of United States currency violate federal counterfeiting statutes, making them contraband *per se* and forfeit as a result. Boggs raises three claims of error before this court. First, he argues that his "Boggs Bills" are protected by the First Amendment, and that this case is controlled by the line of cases creating increased preseizure procedural safeguards for expressive materials. Because those safeguards were not observed, he argues, it was improper for the district court to reach a judgment on the merits. Second, he argues that the district court erred by conducting an *in camera, ex parte* examination of his work when ruling on cross-motions for summary judgment. Finally, he contends that the court below applied the wrong standard in determining that the bills are counterfeit. Boggs argues that these errors require us to order the government to return his artwork, or grant him an adversarial hearing in open court. We disagree. The district court correctly stated and, so far as we can tell from the record before us, correctly applied the appropriate standards in this case. We affirm for the reasons stated below.

I. BACKGROUND

The extensive factual background has been discussed in detail in *Boggs v. Bowron*, 842 F. Supp. 542, 544-46 (D.D.C. 1993), *aff'd*, 67 F.3d 972 (D.C. Cir. 1995) (unpublished table decision), and *Boggs v. Merletti*, 987 F. Supp. 1, 3-6 (D.D.C. 1997), and we need not reiterate it here. We supply only the detail necessary to explain our decision. Art is supposed to imitate life, but when the subject matter is money, if it imitates life too closely it becomes counterfeiting. Boggs creates *trompe l'oeil* (so lifelike as to fool the eye) images of U.S. currency with alterations such as substituted names or pictures, or nonexistent denominations, but generally with the same size,

shape, layout and color as legal tender. Boggs then barters his drawings in return for goods and services. He has spent thousands of his pictures as currency since he began this project. No one contends that Boggs intends to defraud his customers. Boggs explains to the people receiving his bills that he is an artist and that the bills are not real cash. He then engages them in a discussion on the value of money and the social and political institutions that underlie the system of exchange. But the transactions do not end there. Bogg's ultimate customers come to him to purchase the entire transaction. Boggs gives them a receipt for the goods he purchased, the change he received, and the name of the person who accepted his "Boggs Bills" as payment. The buyer goes to the holder of the Boggs Bill and negotiates a purchase price. Boggs then works with the buyer, putting together a display including the art work, the receipt and the change.

Because of the nature of his work, Boggs has drawn the attention of the counterfeiting investigators of the Secret Service on many occasions, although he has never been criminally prosecuted. This case arose because in two separate events, in Cheyenne, Wyoming, in 1991 and Pittsburgh, Pennsylvania, in 1993, Secret Service agents seized Boggs's artwork as contraband counterfeit bills violating the requirements of 18 U.S.C. § 474.

In Cheyenne, Secret Service agents were told that Boggs had tried to buy goods at a local Kmart, explaining that he wanted to get face value for a $100 Boggs Bill. A Secret Service agent and the U.S. Attorney for the District of Wyoming visited his hotel room without a warrant and, after what Boggs characterized as tense negotiations conducted under the threat of arrest, fifteen Boggs Bills were taken from his hotel room. Boggs was never criminally prosecuted.

In Pittsburgh, Boggs planned to proceed on a much grander scale. He conceived and publicized "Project Pittsburgh," his plan to spend $1 million in Boggs Bills in the Pittsburgh area, asking each recipient to pass the bill 5 times before taking it out of circulation. In November 1992, officials from the United States Attorney's office and the Secret Service met and discussed Boggs's plans. The group decided that Boggs could not be allowed to distribute $1 million in Boggs Bills. Secret Service agents acting pursuant to warrants seized more than 1,300 items from Boggs's home and studio.

Boggs requested the return of all of his property, exhausted his administrative remedies and began this action.

II. PROCEEDINGS IN THE DISTRICT COURT

Boggs filed an action in the district court on September 3, 1993, seeking an injunction against prosecution and the return of the Boggs Bills seized in Cheyenne and Pittsburgh. On December 9, 1993, the district court denied the preliminary injunction and refused to enjoin future prosecution. *See Bowron,* 842 F. Supp. at 562-63. The district court also ruled that 18 U.S.C. §§ 474 and 504 are constitutional on their face and as applied. Boggs filed an interlocutory appeal with this court on the First Amendment issue, seeking a ruling that the First Amendment prevented the counterfeiting sections from applying to his work. In October, 1995, on interlocutory appeal we upheld the district court's decision that the statute was constitutional. We affirmed the district court's denial of injunctive relief and remanded. *See Boggs v. Bowron*, 67 F.3d 972 (D.C. Cir. 1993) (unpublished table decision).

Following remand, both parties made cross-motions for summary judgment. Boggs argued that the warrantless seizure in Cheyenne and the seizure without a prior hearing

in Pittsburgh violated heightened First Amendment procedural guarantees for presumptively expressive materials, and that the appropriate remedy was return of the seized goods. Boggs also argued that the heightened standards previously applied in obscenity cases, including the right to a pre-seizure adversarial hearing, should have been applied in this case. The government argued that the First Amendment's heightened standards do not apply, and that a judicial hearing is not constitutionally required after the seizure of counterfeit currency. The government also argued that it could not be required to return the Boggs Bills because they are contraband prohibited by 18 U.S.C. §§ 474 and 481.

Boggs moved for a hearing in open court to determine if the bills were contraband *per se* and was denied one by the district court. On October 23, 1997, the district court inspected *in camera* all of the Boggs Bills seized in Pittsburgh. The court agreed with the Secret Service that certain bills were contraband within the meaning of sections 474 and 481 of the criminal code, and that they could not be returned to Boggs. The district court therefore granted the government's motion for summary judgment and dismissed the case with prejudice.

III. Analysis

A. Contraband per se

We need not determine whether the Cheyenne seizure was legal under the Fourth Amendment because Boggs dos not challenge the premise that if the seized bills violate the likeness or similitude standards in 18 U.S.C. § 474, they are contraband *per se* and cannot be returned. Contraband *per se* comprises objects which are inherently unlawful to possess, regardless of how they are used. As we explain below, the Boggs Bills in this case fall within

that category. The district court properly noted that "[i]ndividuals have no property right in contraband materials and contraband materials may not be returned to them." *Merletti*, 987 F. Supp. at 10. This Circuit addressed the issue in United States v. Farrell, 606 F.2d 1341, 1344 (D.C. Cir. 1979):

> Decisional law recognizes two kinds of contraband. Traditional or *per se* contraband is defined as "objects the possession of which, without more, constitutes a crime." *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699, 85 S.Ct. 1246, 1250, 14 L.Ed.2d 170 (1965). It is well established that a claimant has no right "to have [*per se* contraband] returned to him." *United States v. Jeffers*, 342 U.S. 48, 54, 72 S.Ct. 93, 96, 96 L.Ed. 59 (1951); *Trupiano v. United States*, 334 U.S. 699, 710, 68 S.Ct. 1229, 92 L.Ed. 1663 (1948).

We now turn to whether the District Court correctly found that the Boggs Bills were contraband *per se*.

B. First Amendment Considerations

The main thrust of Bogg's argument is not that the district court erred in its determination that the Boggs Bills violate the statutory requirements, but rather that the district court erred in looking at the bills at all. Boggs argues that special procedures established by the Supreme Court under the First Amendment protecting books and films in obscenity cases apply with equal force to his artwork. The Supreme Court has indeed held law enforcement officers to a higher standard when presumptively expressive materials are involved because of the risk of prior restraint and censorship. *See, e.g., Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 63 (1989) (recognizing the risk of prior restraint); *see also Roaden v. Ken-*

tucky, 413 U.S. 496, 501 (1973) (holding that seizure of expressive materials in some instances requires additional safeguards); *Heller v. New York*, 413 U.S. 483, 491-92, *Huffman v. United States*, 470 F.2d 386, 392 (D.C. Cir. 1971). Boggs suggests that the Secret Service should have met more stringent warrant requirements and that he should have been granted a prior adversarial hearing before an independent judicial officer. We disagree.

The cases Boggs cites are all obscenity cases, where significant judgment was needed to determine if the seized materials violated community standards. We need not determine the range of cases to which additional protection would apply. We simply hold that on the facts before us, they do not. The important First Amendment concerns advanced by the Supreme Court in the obscenity cases are not present to the same extent here. Bogg's artwork is designed to look like money. While some judgment is needed on the part of the officers charged with enforcing the counterfeiting statutes, the inquiry is not inherently content-based and thus poses little risk of acting as a prior restraint on expressive materials.

C. In Camera Examination

Boggs objects to the district court's *in camera* examination of the bills when ruling on the motions for summary judgment. He also alleges that there may have been inappropriate *ex parte* communication between the government and the district court when the Boggs Bills were submitted. We hold that he has no right to have the evidence examined in open court on motions for summary judgment. *See Spark v. Catholic Univ. of Am.*, 510 F.2d 1277, 1280 (D.C. Cir. 1975) (district court may "dispense with oral arguments in appropriate circumstances in the interest of judicial economy"). The district court awarded summary judgment in this case in accordance

with FED. R. CIV. P. 56(c) which states that "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." It is common practice for trial judges to examine not only written evidence, but also exhibits when deciding if there is a genuine issue of material fact. The existence of the specific bills is not a genuine issue of fact. The district court was applying the law to the bills before it to determine if they violated the counterfeiting statutes and were forfeit as contraband. We find nothing unusual in the district court conducting an *in camera* examination of the relevant evidence here. It appears that the district court properly examined the items submitted to it by the Secret Service, and there is nothing in either the district court's memorandum opinion or the record to suggest that it relied on any *ex parte* communication in reaching its decision.

Boggs now complains that he cannot tell from the record what was submitted, but he received notice from the government listing the items submitted. *See* Defendants' Notice of In Camera Submission, *reprinted* in Joint Appendix at 263 (listing the materials being presented to the court). Boggs was free to request access to the materials at that time. He did not. He failed to make a timely objection to the submission below, and did not move to supplement the record here under FED. R. APP. P. 10(e) or otherwise. If there was error, we hold that it was insignificant and Boggs could have avoided any ill effect by proper motion below.

D. Wrong Standard

Finally, we find that Boggs's argument that the district court applied the wrong standard has no merit. We have already considered and upheld the district court's constitutional analysis. We now hold that the district court correctly stated the standard under 18 U.S.C. § 492, which provides in pertinent part:

> All counterfeits of any coins or obligations or other securities of the United States or of any foreign government, of any articles, devices, and other things made, possessed, or used in violation of this chapter or of sections 331-333, 335, 336, 642 or 1720, of this title, or any material or apparatus used or fitted or intended to be used, in the making of such counterfeits, articles, devices or things, found in the possession of any person without authority from the Secretary of the Treasury or other proper officer, shall be forfeited to the United States.

The district court correctly found that the statute prohibits the possession of bills made or executed after the similitude of United States obligations. Examining certain of the bills seized in Pittsburgh, the district court concluded that

> all of the items that the Secret Service contends are contraband are, to this court's satisfaction, reproductions of genuine currency of the United States or reproductions of genuine foreign currency. Each are in the likeness and similitude of genuine currency and therefore in violation of 18 U.S.C. §§ 472 or 481. Each reproduction has the general design and appearance of genuine United States or foreign currency. None of the pieces in dispute meet the size and coloration exemptions of 18 U.S.C. § 504 and 31 C.F.R. 411.1. This court is therefore compelled to hold that [the disputed items] are contraband. These items are

> therefore forfeited to the United States without the necessity of forfeiture procedures.

Merletti, 987 F. Supp. at 11. The district court properly applied the same analysis regarding the bills seized in Cheyenne.

Boggs now asks us to overturn the district court's grant of summary judgment on the merits. On brief, he opposed the government's offer to present the Boggs Bills to this court, only changing his position during oral argument. After oral argument, he moved to supplement the record, and now asks that he be allowed to argue the merits of the district court's determination that the bills violate the counterfeiting statute. This is simply too late in the appellate process, and we hold that he has waived any right to our full examination of the evidence. Rule 28(a)(4) of the Federal Rules of Appellate Procedure requires that the appellant's argument "contain 'the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on.'" See *Carducci v. Regan*, 714 F.2d 171 (D.C. Cir. 1983) (refusing to determine issue that had not been fully briefed by parties). If Boggs wished this court to make a full reexamination of the merits of the grant of summary judgment, it was his duty as appellant to request that this court do so and present argument on that question. We will not consider at this late stage an argument that the appellant failed to raise.

IV. CONCLUSION

We conclude that the district court did not err either in the procedure it followed or the standard it applied in ruling on the motions for summary judgment before it and concluding that the bills it examined were forfeit as contraband. The judgment of the district court is affirmed.

ROGERS, *Circuit Judge*, concurring in part and dissenting in part: The court affirms on de novo review the district court's grant of summary judgment by concluding that "art" it has never seen is "so far as we can tell" contraband *per se*. *See* opinion at 2. Boggs should not be too surprised by this result, as his appeal focused on his First Amendment procedural claim without explicitly contending that his art does not meet the statutory definition of counterfeit currency. Rather, he contended that the district court applied the wrong standard in concluding his art was counterfeit under 18 U.S.C. § 474. But on de novo review, where this court "sits in the same position as the district court," [1] we cannot truncate Boggs' contentions as quickly and neatly as the court would like.

Implicit in Boggs' challenge to the manner in which the district court reviewed his work and the gloss the court imposed on 18 U.S.C. § 474 is the assumption that if he does not prevail on these claims, the question of the legal status of his bills will remain open for the court. Indeed, the first paragraph of his argument in his brief cites a decision from this court noting that we have an obligation to make an independent examination of the record as a whole in cases implicating the First Amendment. Appellant's Brief at 15 (citing *Liberty Lobby, Inc. v. Rees*, 852 F.2d 595, 598 (D.C. Cir. 1988) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964))). In the last paragraph of his brief he seeks, as an alternative to reversal and prompt return of his property, further proceedings with respect to the remaining materials. *Id.* at 32. Moreover, in its brief the government relied on the fact that this

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[1] *Stroup v. GSC Serv. Inc.*, 938 F.2d 20, 22 (2d Cir. 1991); *Bloomington Nat'l Bank v. Telrer*, 916 F.2d 1305, 1307 (7th Cir. 1990); *T.W. Elec. Serv. Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

court must "undertake its own independent analysis . . . of whether the bills in question are 'in the likeness of' or 'after the similitude' of genuine currency within the meaning of Criminal Code § 474" in maintaining that whether the district court viewed the bills in camera "is simply beside the point to the issue presented to this Court." Appellee's Brief at 12. In response, Boggs contended that the government has never demonstrated that each of the seized items is contraband per se. Reply Brief at 2.

Of course, Boggs might have stated his argument more clearly by explicitly requesting what he sought implicitly, but his failure to take the formal step of adding a sentence to his brief seeking a de novo examination by this court of, each sized item does not warrant the dispositive significance attached to it by the court. The court's rigid insistence on formality is particularly inappropriate here because in his complaint filed in the district court Boggs expressly challenged the government's "mistaken" interpretation of § 474, *see* Complaint at ¶ 21, and he sought a hearing before the district court to oppose the government's classification of his art as contraband. Given that this case involves government regulation—indeed, confiscation—of expressive materials, and that art may at times imitate reality,[2] this court is obliged on de novo review of the grant of summary judgment to look at the Boggs bills to determine if they meet the statutory criteria for counterfeit currency.[3]

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[2] Labeling a counterfeit bill "art" will not save it from the Secret Service's incinerator, but at some point, an artwork's loose resemblance to currency will not strip it of First Amendment protection. *Cf. Regan v. Time, Inc.*, 468 U.S. 641 (invalidating and upholding portions of § 474). Congress struck a balance between these extremes in § 474, and it falls to this court to determine whether, in the judgment of Congress, Boggs' art imitates reality too effectively.

[3] Our obligation is particularly clear in light of declarations from an art professor and a museum curator attesting to the artistic in-

Without viewing the bills, this court cannot determine for itself whether the district court correctly applied the law, or even if it applied the correct law. It is not sufficient to rely, as the court does, *see* opinion at 8, on the district court's recitation of the correct statutory standards. Elsewhere in its opinion, the district court described 18 U.S.C. § 474 as essentially objective, yet it appears to incorporate a substantial degree of subjectivity.[4] In addition, the district court's findings that a sponge and bow tie are in the "similitude" of actual currency raise questions about its statutory interpretation that warrant scrutiny on appeal.

Any doubt that reviewing the Boggs bills is appropriate should have been dispelled by the government's advocacy of the same result. In its brief, the government invited this court to review the bills, and it even brought its trove of confiscated art to the oral argument. Only at oral argument—after Boggs orally moved to supplement the record and the government saw the possibility of affirmance without exposing the Boggs bills to further judicial scrutiny—did the government retreat from its prior position of openness. Indeed, it is somewhat ironic that in an opinion that turns on the concept of waiver, the court ignores the government's repeated acceptance of the outcome that the court now deems Boggs to have foreclosed.

Moreover, reviewing the Boggs bills would not be arduous, at least not as the court suggests.[5] *See* opinion at 9.

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tegrity of Boggs' work. A third declaration, from a distinguished art historian, notes the historical pedigree of Boggs' decision to create images of money, and reminds us that since as early as 1886, the sensibilities of American artists and anti-counterfeiting authorities have collided.

[4] No one disputes that Boggs raised a timely challenge to the district court's interpretation of § 474.

[5] Of course, arduousness could hardly be determinative of this court's responsibility on de novo review.

If this court supplements the record, it would be in the same position as the district court, which rendered its decision after viewing the bills without conducting a hearing and apparently without relying on extraneous source material. The court's resolution of appellant's First Amendment claim characterizes § 474 as requiring relatively objective judgments that a law enforcement officer can make without need for an adversarial pre-seizure hearing before a magistrate. *See* opinion at 6. If § 474 is as easy to apply as the court says it is, there should be no difficulty in reviewing the Boggs bills without further argument from the parties. It may well be that Boggs focused on procedural claims rather than the merits of the district court's *in camera* review to postpone an affirmance that he may perceive as inevitable, but we will not know until we look.

The court's reliance on Fed. R. App. P. 28(a), see opinion at 9, is therefore insufficient to abrogate its obligation to review the Boggs bills de novo.[6] As this circuit has noted, Rule 28 does not automatically require ignoring issues that a party fails to present clearly in its brief. Rather, "substantial public interests" or the need to avoid an "unduly harsh" result justify relaxing traditional foreclosure principles. *Consumers Union v. Federal Power Comm'n*, 510 F.2d 656, 662 n. 10 (D.C. Cir. 1975). In such cases, a "balancing of considerations of judicial orderliness and efficiency against the need for the greatest possible accuracy in judicial decisionmaking" warrants appellate review of ostensibly waived issues. *Id.* at 662; *see also Columbia Gas Transmission Corp. v. FERC*, 844 F.2d 879, 880 (D.C. Cir. 1988).

Bcause this court is unable to review the district court's interpretation of § 474—which it purports to affirm—

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[6] The court has authority under Fed. R. App. P. 10(e) to supplement the record "on its own initiative."

without viewing the Boggs bills, I would grant Boggs' motion to supplement the record to include the confiscated Boggs bills and would view the bills in order to determine de novo whether they fall within the statutory definitions of counterfeit currency. Accordingly, I dissent from Part III(D) of the court's opinion.[7]

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[7] With respect to Boggs' claim that the district court erred by viewing the bills *ex parte*, I concur in the opinion of the court only to the extent that its relies on Boggs' failure to seek access to the bills during the district court proceedings. While the district court's procedure does not result in reversible error, it is impossible to characterize *ex parte* receipt of unknown materials not in the record as "insignificant." I also concur in the court's holding that *in camera* review was otherwise appropriate.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 93-1845 (RCL)

Filed October 29, 1997

J.S.G. BOGGS,

Plaintiff,

v.

LEWIS C. MERLETTI,[1] *et al.*

Defendants.

MEMORANDUM OPINION

This matter comes before the court on cross-motions for summary judgment on plaintiff's claim for the return of his seized property. Upon consideration of the parties' statements of points and authorities, affidavits, declarations and exhibits, and this court's *in camera* review of the property in dispute, plaintiff's motion for summary judgment is denied and defendants' motion for summary judgment is granted.

I. BACKGROUND

A. Factual Background

J.S.G. Boggs ("Boggs") is an artist and academic with an appointment at Carnegie-Mellon University whose

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[1] Under Fed. R. Civ. P. 25(d)(1), this court hereby orders the substitution of the current Director of the United States Secret Service as a defendant in this action.

greatest acclaim—in both the artistic and legal worlds—derives from his drawings of United States and foreign currency ("Boggs Bills"). Many of these reproductions are actual size, *trompe l'oeil* pieces on which Boggs alters some of the design elements from genuine bills, such as replacing the signature of the Secretary of the Treasury with his own, changing the portrait on the front, or creating a denomination that does not exist. Boggs travels the country bartering his work for goods and services by explaining to merchants that he is an artist. Affidavit of J.S.G. Boggs at 2-3. His chosen means of artistic expression has been the subject of substantial of media interest, including coverage in *The New York Times, The Washington Post* and *The London Times,* as well as NBC, CBS, ABC and PBS television.

The United States government has also taken an interest in Boggs' artistic pursuits, an interest which has been a source of significant consternation and frustration for him for almost all of this decade. The specific events relevant to this matter began in March 1991, when the Secret Service learned that Boggs was attempting to obtain merchandise from a Cheyenne, Wyoming K-Mart using one of his Boggs Bills. Declaration of Special Agent Jerry P. Henson at 2. Secret Service agents subsequently met with Boggs in his hotel room, and left this encounter with fifteen Boggs Bills samples. At that time Boggs was advised that the pieces appeared to be in violation of federal counterfeiting statutes. As of this date, the government has not returned the samples taken in Wyoming, alleging that they violate Chapter 25 of Title 18 of the U.S. Code and are contraband.

In November 1992, the Secret Service became aware that Boggs had printed $1 million in Boggs Bills and was planning on using them in the greater Pittsburgh area as part of "Project Pittsburgh," in which Boggs was planning

to ask people to spend the bills five times before taking them out of circulation. Affidavit of Thomas M. Abraham in Support of Application for Search Warrant at ¶ 17. In December of that year, pursuant to a warrant issued by the chief magistrate of the Western District of Pennsylvania, Secret Service agents conducted a search of Boggs' person, studio and residence, seizing a large quantity of Boggs Bills as well as hundreds of other items. In a December 8, 1992 meeting with the Secret Service, Boggs was advised that many of the seized items appeared to be in violation of counterfeiting statutes and that prosecution was a possibility. On March 3, 1995, the United States Attorney for the Western District of Pennsylvania declined to prosecute Boggs. *See* Letter from Charles F. Flynn, Assistant U.S. Attorney, to Kent Yalowitz, Esq. (April 14, 1995) ("Flynn Letter"). As of this date, the government has not returned the Boggs Bills taken in Pittsburgh, alleging that they are contraband, though they have offered to return other items (presumed to be non-contraband) taken in the seizure.

Plaintiff filed suit in September 1993, stating two claims for relief. In the first claim, plaintiff sought declaratory and injunctive relief, contending that the Secret Service's past actions and threatened prosecutions were causing him to suffer irreparable injury constituting a violation of his First Amendment rights. In *Boggs v. Bowron*, 842 F. Supp. 542 (D.D.C. 1993) ("*Boggs v. Bowron*"), *aff'd*, 67 F.3d 972 (D.C. Cir. 1995) (unpublished table decision) this court held that 18 U.S.C. §§ 474 and 504—the counterfeiting statutes which the Boggs Bills allegedly violate—were both facially constitutional and constitutional as applied to Boggs. *Id.* at 562. Defendants were awarded summary judgment as a matter of law. Plaintiff now asks this court to address the second claim for relief and order the Secret Service to return the Boggs Bills

seized in Cheyenne and Pittsburgh. The gravamen of Boggs' contention is that in executing these two seizures, the Secret Service failed to comply with the special procedural protections established for presumptively expressive materials. These protections include a more strictly applied warrant requirement and a right to a prior adversarial hearing on notice before an independent judicial officer. For the Secret Service's failure to comply with these protections, Boggs contends that the proper remedy is return of the items.

II. ANALYSIS

A. The Seizures Did Not Violate the Constitution

1. The Cheyenne "Encounter" Was Not a Seizure

Plaintiff claims that in the Cheyenne seizure, "the government acted without a warrant. Under *Roaden* [*Roaden v. Kentucky*, 413 U.S. 496, 504-05 (1973)], that ends the matter." Plaintiff's Statement of Points and Authorities at 9. This court does not agree that the constitutional analysis can be so summarily concluded. The validity of the government's conduct in Cheyenne first turns on whether the events that transpired in March 1991 constitute a Fourth Amendment "seizure" such that the warrant requirement is triggered. Consent is one of the major established exceptions to the warrant requirement, *see, e.g., Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *United States v. Lewis*, 921 F.2d 1294, 1300 (D.C. Cir. 1990). The possibility that both the entry into the hotel room and the seizure of the samples were done with Boggs' consent is implicated by both the government's and Boggs' depiction of the Cheyenne encounter.

According to plaintiff's Rule 108(h) Statement of Material Facts as to Which There is No Issue, ¶ 10, the authorities "appeared at Boggs' hotel room door without

a warrant. They left with fifteen pieces of Boggs' art." The court is asked to conclude from this two sentence description of the encounter and nothing else that an unconstitutional search and seizure occurred. The government, on the other hand, construes the initial appearance and entry of the agents as a "visit." *See* Defendants' Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment at 2. As to the taking of the sample reproductions of Boggs' work, the Secret Service contends that Boggs voluntarily handed over the samples. *Id.*

Even taking the two characterizations and all of the evidence before the court in the light most favorable to plaintiff, this court does not find that the events that transpired in Cheyenne constitute a Fourth Amendment seizure such that the warrant requirement was triggered. First, there is no indication from any of the materials offered in support of plaintiff's summary judgment motion that the government's initial entry into the hotel room was anything but consensual. In Boggs' complaint, he states only that the Secret Service "appeared at [my] hotel room door . . ." Plaintiffs Verified Complaint ¶ 11. The Secret Service, in describing the entry into the room, states, "[u]pon knocking on the door, identifying ourselves and explaining the purpose of our visit, Mr. Boggs invited us into his room." Declaration of Special Agent Jerry P. Henson at ¶ 7 ("Henson Declaration"). These two characterizations are not incompatible, let alone contradictory, as the Secret Service's description of their entry does include an "appearance" at the hotel room door. The fact that plaintiff has not offered any evidence that the agents' entry into the room was nonconsenual, or at all contrary to Agent Henson's portrayal, leads this court to conclude that there is no such evidence. The fact that Boggs may have been surprised or less than delighted by the Secret

Service visit at the moment of their arrival does not by itself implicate the Fourth Amendment warrant requirement. This court cannot hold, in the absence of at least some evidence to the contrary, that the Secret Service's entry into Boggs' Cheyenne hotel room was a nonconsenual entry requiring the agents to have previously obtained a warrant.

Having concluded that the entry into the room was consensual and did not trigger the Fourth Amendment warrant requirement, the second question to address is whether Boggs' relinquishment of the fifteen samples was also consensual. Boggs' complaint states that in response to their demand for his entire inventory of art, Boggs offered the agents a single example of each type of work. Verified Complaint at ¶ 11. After what Boggs describes as "several hours of tense negotiation, during which it appeared to Boggs that he would be arrested and prosecuted for the content of his art," the agents agreed to take only fifteen Boggs Bills samples. *Id.*

Agent Henson's description of what transpired diverges from Boggs' account:

> Boggs was asked if he had samples of his reproductions available in his room. He provided a quantity of reproductions that he obtained from a briefcase in his room. . . . Mr. Boggs was advised that the reproductions appear to be in violation of counterfeiting statutes and were subject to seizure. At no time during this visit was Mr. Boggs ever threatened with arrest. However, Mr. Boggs was requested to provide a general sampling of his bills and he subsequently gave fifteen samples of his reproductions.

Henson Declaration at ¶¶ 7-8. Based upon these conflicting accounts, there are two bases upon which this court concludes that the relinquishment of the Boggs Bills

did not constitute a Fourth Amendment seizure. It is true that coercion invalidates the consent exception for searches and seizures, *see e.g., Schneckloth*, 412 U.S. at 225-26 quoting *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961) ("if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process"). However, plaintiff has not pointed to any specific statement or conduct on the part of the Secret Service such that this court could conclude that the government obtained the samples through coercion. Plaintiff did state that he feared arrest, but he offers no basis whatsoever for that fear, an omission that is especially problematic in light of the fact that Agent Henson's sworn statement affirmatively indicates that Boggs was never threatened with arrest. Without any evidence of coercion, threatening statements, or hints of arrest, this court cannot conclude that the relinquishment of the fifteen samples was anything but consensual.

Second, none of the samples turned over to the Secret Service were the product of the alleged "several hours of tense negotiation." According to Boggs' chronology of the events in the Cheyenne hotel room, the Secret Service first demanded all of the Boggs Bills, but rather than absolutely denying their request and sending the agents away (an act which would have been within his right), he *offered* them "a single example of each type of work." Verified Complaint ¶ 11. It is undisputed that at the conclusion of the encounter in the hotel room, the government left with only the fifteen samples originally offered by Boggs—nothing more. In other words, rather than Boggs succumbing to the pressure of the Secret Service, the Secret Service succumbed to him. Even if there were several hours of tense negotiation during which Boggs was subjectively in fear of arrest, none of the Boggs Bills at issue

were obtained as a result of that "pressure." Since all the government took was that which Boggs offered at the outset, this court fails to see how the government's seizure could be characterized as the product of coercion.

Because this court finds that the Secret Service was in Boggs' hotel room with his permission, and that Boggs voluntarily provided the fifteen samples to the agents, this court holds that the Cheyenne encounter was not a Fourth Amendment seizure. The government's actions in March 1991 did not violate plaintiff's constitutional rights, as the entire Cheyenne encounter falls under the consent exception to the warrant requirement.

2. An Adversarial Proceeding on Notice was Not Required Prior to the Issuance of the Pittsburgh Warrant

The events that transpired in Pittsburgh do require this court to consider whether proper Fourth Amendment procedural safeguards were followed prior to the seizure of Boggs' presumptively expressive materials.[2] In Pittsburgh, the Secret Service obtained warants for Boggs' residence, person and studio; there is no dispute that both a "search" and a "seizure," as those terms are commonly understood, occurred. The question for this court is whether the magistrate's authorization of the warrant afforded the proper rigorous procedural protections and was based on sufficient information so as to ensure against the unjustified suppression of legitimate First Amendment speech.

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2 In *Boggs v. Bowron*, this court held that the Boggs Bills were expressive materials, presumptively protected by the First Amendment. *Boggs v. Bowron*, 842 F. Supp. at 551. That holding is "law of this case" for this analysis, and this court will proceed under the presumption that "Mr. Boggs has a First Amendment right to create illustrations of United States currency absent constitutionally permissible overriding considerations." *Id.*

When the subject matter of a search is expressive material, the potential for a seizure to act as a *de facto* prior restraint of that speech requires a more searching inquiry before issuing a warrant. "Thus, while it is the general rule under the Fourth Amendment that any and all contraband, instrumentalities and evidence of crimes may be seized on probable cause, it is otherwise when materials presumptively protected by the First Amendment are involved." *Fort Wayne Books v. Indiana*, 489 U.S. 46, 63 (1989) (recognizing the risk of prior restraint); *see also Roaden v. Kentucky*, 413 U.S. 496, 501 (1973) ("A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material."); *Marcus v. Search Warrant*, 367 U.S. 717 (1961).

Plaintiff contends that for the government to seize his art *en masse*, as occurred in Pittsburgh, the government was required to first secure judicial approval in an adversary hearing on notice. As authority for this proposition, plaintiff cites *Fort Wayne Books*, 489 U.S. at 63. However, this court finds that the concerns triggering the need for the pre-seizure adversary hearing in that and similar cases are not present in the Pittsburgh seizure.

Fort Wayne Books, along with *Roaden*, *Heller v. New York*, 413 U.S. 483 (1973), *Huffman v. United States*, 470 F.2d 386, 392 (D.C. Cir. 1971) and the other cases cited in support of plaintiff's argument that additional process is demanded for warrants covering expressive materials have one common thread—they are obscenity cases. The probable cause determination in such cases centers around whether the subject of the potential seizure violates an obscenity statute. This court agrees that obscenity cases do provide a good starting point for the analysis that the court is undertaking here, as they present the paradigm situation in which presumptively expressive

materials are routinely seized, raising the specter of prior restraints and censorship pending prosecution.

The analogy is not a perfect one, however. The rationale behind requiring special procedures (such as *in camera* review or adversary hearings on notice) before authorizing a seizure pursuant to an obscenity statute is that a determination as to whether a photo, film or book is obscene (and therefore unprotected) versus only pornographic (and therefore protected) is inherently *subjective*. "Because the line between protected pornographic speech and obscenity is dim and uncertain, a State is not free to adopt whatever procedures it pleases for dealing with obscenity, but must employ careful procedural safeguards to assure that only those materials adjudged obscene are withdrawn from public commerce." *Fort Wayne Books*, 489 U.S. at 79 (citations omitted); *see also Roth v. United States*, 354 U.S. 476, 488, 491 (1957) (recognizing the complexity inherent in determining whether materials are obscene). "The line between speech unconditionally guaranteed and speech which may be legitimately regulated, suppressed or punished is finely drawn. The separation of legitimate from illegitimate speech calls for . . . sensitive tools." *Marcus*, 367 U.S. at 730-31. If obscenity seizures were to be authorized on nothing more than an officer's affidavit, the affiant would have substantial, if not exclusive power to make the difficult determination as to whether the material in question taken as a whole, appeals to the prurient interest in sex, or portrays in a patently offensive way, sexual conduct specifically defined by the applicable state law. *Miller v. California*, 413 U.S. 15 (1973). For a magistrate or other judicial officer to make a probable cause determination based merely on the bald affidavit of a police officer presents too much of a possibility that the subjective impression of that police officer will act as a prior restraint on protected speech.

It is the evaluative aspect and sensitivity inherent in making an obscenity determination that requires a magistrate to have more than the officer's word at his or her disposal. "When presumptively protected materials are sought to be seized, the warrant requirement should be administered to leave as little as possible to the discretion or whim of the officer in the field." *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978).

The difficulty encountered in determining whether materials are obscene is not present when determining whether materials might violate counterfeiting statutes. While an obscenity determination requires *evaluation*, a counterfeiting determination requires only *observation*. The seizures in the instant case were executed based upon potential violations of Chapter 25 of Title 18 of the United States Code. To make a finding of probable cause that the relevant statutes were being violated, the issuing magistrate needed to be convinced of only three facts: 1. that the bills were made or executed in whole or in part after the similitude of United States obligations, 18 U.S.C. § 474 para. 5; 2. that the bills were color reproductions, 18 U.S.C. § 504(1); and, 3. that they were more than three-fourths or less than one and one-half the size of actual United States currency, *id.* No "subjective" determinations were required—all the factors can be established with the naked eye. Any law enforcement officer—or even a lay person—who has average familiarity with United States currency could make the necessary observaitons of similarity, size and color to conclude that Boggs Bills potentially violate the counterfeiting statutes at issue. The concern underlying the additional process for obscenity warrants—that a law enforcement officer will use his or her own internal definition of "prurient interest" or "patently offensive" to restrain speech based upon a mere dislike of the speech—is practically nonexistent here. The

criteria that renders something as counterfeit does not require reaching a legal conclusion, but rather a factual one. When a determination can be made entirely on observation rather than evaluation, the traditional warrant requirement is sufficient, even when presumptively protected materials are at issue.

Perhaps the most apt analogy to the instant case is not obscenity seizures, but rather warrants issued in child pornography cases where a determination of potential violations of applicable law can be made on the basis of more observation. The courts have held that probable cause determinations in the child pornography area can be made solely on the basis of affidavits even though potentially expressive speech could be restrained when the affiant is wrong. "Identification of visual depictions of minors engaging in sexually explicit conduct, in comparison [to the legal determination as to whether materials are obscene], is a factual determination that leaves little latitude to the officers." *United States v. Kimbrough*, 69 F.3d 723, 727-28 (5th Cir. 1995); *United States v. Koelling*, 992 F.2d 817, 822 (8th Cir. 1993) (noting that while there is some chance of a mistaken seizure, generally, "most minors look like minors and most adults look like adults, and most of the time most law enforcement officers can tell the difference."); *United States v. Smith*, 795 F.2d 841 (9th Cir. 1986). The child pornography holdings demonstrate that courts do not require more rigorous procedural safeguards or an adversarial hearing prior to seizure when law enforcement officers have objective and non-evaluative criteria by which to make their determinations. Similarly, in order to demonstrate probable cause in support of the Boggs warrant, all that had to be ascertained was that the bills were in the likeness of United States currency, that they were in color, or that they were of an impermissible size. Such objective criteria obviate the necessity for any-

thing more than the standard Fourth Amendment inquiry required for issuance of a warrant.

Substantial deference is given to a magistrate's determination that probable cause exists. *Massachusetts v. Upton*, 466 U.S. 727, 733 (1984); *United States v. Vaughn*, 830 F.2d 1185, 1187 (D.C. Cir. 1987); *United States v. Desantis*, 802 F. Supp. 794, 803 (E.D.N.Y. 1992) (noting that a magistrate's finding of probable cause is in and of itself a factor tending to uphold the validity of a warrant). It is this court's conclusion that the information contained in Secret Service Agent Thomas Abraham's Affidavit in Support of Application for Search Warrant ("Abraham Affidavit") provided a legally sufficient basis for the magistrate to issue the warrant authorizing the Pittsburgh search and seizure. In a November 20, 1992 conversation, Boggs admitted to Abraham that, pursuant to "Project Pittsburgh," he had printed $1 million of Boggs Bills and that he would circulate them in Pittsburgh over the next two years. Abraham Affidavit ¶ 17. Having seen Boggs Bills before—specifically, the fifteen Boggs Bills taken in Wyoming—Abraham was able to conclude that they were "sufficiently similar to genuine bills that they satisfy the test of similitude" in violation of 18 U.S.C. § 474 para. 5, that they were color reproductions, and that they were approximately the same size as genuine bills, in violation of 18 U.S.C. § 474, para. 6 and 18 U.S.C. § 504 (printing of photographic likenesses). Abraham Affidavit ¶ 18. This court also holds, based on the above analysis, that the affidavit was, by itself, a legally adequate basis upon which the magistrate could make the probable cause determination. As the warrant was supported by probable cause and did not require additional procedural protections prior to its issuance, this court holds that the Pittsburgh seizure did not violate plaintiff's First Amendment rights.

Finally, in challenging the validity of the Pittsburgh seizure, Boggs takes issue with the quantity of Boggs Bills seized, arguing that the Secret Service should have only taken the one or two samples needed for evidentiary purposes. Boggs points to *Huffman*, 470 F.2d at 392, and *Fort Wayne Books*, 489 U.S. at 63 in support of the proposition that only a single copy of an expressive item should be seized for the purpose of preserving it as evidence for a criminal prosecution. *See also Heller v. New York*, 413 U.S. 483, 492 (1973). This court concludes that plaintiff's analogy to these cases misses an important distinction between the instant case and the obscenity seizures. A court can properly perform its evaluative function as to whether a given book, film or photograph is obscene with just one or two copies of the suspect material. If other copies exist, the First Amendment dictates that those copies should remain available to the public pending a judicial determination of illegality. In this case, however, each Boggs Bill is sufficiently unique such that individual judicial determinations are required as to whether each one violates the relevant counterfeiting statutes. A review of just a "sample" bill could potentially result in an overbroad determination that all of Boggs' work "in the image of money" violates 18 U.S.C. § 474 and is therefore contraband, even if that is not actually the case. The closer analogy to the obscenity area would be if a bookstore sold several allegedly obscene books or if a theater was showing multiple allegedly obscene movies at one time. In such a case, a seizure could include one copy of each of the suspect items and not contravene the First Amendment, provided that the warrant described the areas to be searched and items to be seized with sufficient particularity. Because the Boggs Bills are sufficiently unique such that individual determinations of their legality must be made, the Secret Service was within its right to seize all of the Boggs Bills,

and this court will not apply the *Fort Wayne Books* rule for mass seizures in a context in which it is rationale cannot properly be applied.

C. Boggs' Claim for the Return of the Boggs Bills

Plaintiff's rationale for challenging the above seizures is that he seeks return of the items currently held by the Secret Service. Boggs accurately notes that the proper remedy for the unconstitutional seizure and retention of property is return of the material. *Huffman*, 470 F.2d at 392; *United States v. Pryba*, 502 F.2d 391, 404 n.97 (D.C. Cir. 1974). Having now determined that neither the Cheyenne nor the Pittsburgh seizures were improperly authorized or violative of plaintiff's constitutional rights, Boggs may not claim entitlement to the return of the seized items on that basis.

This court nonetheless elects to address plaintiff's claim for the return of the Boggs Bills. "The general rule is that seized property, other than contraband, should be returned to its rightful owner once the criminal proceedings have terminated." *United States v. Farrell*, 606 F.2d 1341, 1343 (D.C. Cir. 1979) (quoting *United States v. LaFalch*, 565 F.2d 81, 83 (6th Cir. 1977); *see also Cooper v. City of Greenwood*, 904 F.2d 302, 304 (5th Cir. 1990). Because the government has declined to prosecute plaintiff in either the District of Wyoming or the Western District of Pennsylvania, the criminal proceedings are effectively terminated, and Boggs has a right (subject to the qualifications described below) to make a claim for the return of his goods.[3] Furthermore, the length of time that

[3] To the best of this court's knowledge, plaintiff has not filed a motion pursuant to Federal Rule of Criminal Procedure 41(e) for the return of his property in either the District of Wyoming or the Western District of Pennsylvania. As the government has not challenged plaintiff's bringing his claim for the return of the seized

has elapsed betwen the seizures and the government's final decision not to prosecute—almost two years—mitigates in favor of plaintiff's claim for the return of his goods. *See Eckstein v. Cullen*, 803 F. Supp. 1107, 1116 (E.D. Va. 1992) (noting that the duration of a seizure implicates the First Amendment when expressive materials are at issue); *United States v. Premises Known as 608 Taylor Avenue, Apartment 302*, 584 F.2d 1297, 1302 (3d Cir. 1978) (stating that the government can retain possession for only a reasonable time).

Whether or not Boggs is entitled to the return of his art turns on this court's determination as to whether the Boggs Bills are contraband. Individuals have no property right in contraband materials and contraband materials may not be returned to them. *United States v. Jeffers*, 342 U.S. 48, 52 (1951); *Trupiano v. United States*, 334 U.S. 699, 710 (1948). Notably, this is true whether or not the initial seizure of the property was improper, and whether or not any person connected with the seizure has been convicted of a crime. *Id.*

Contraband is divided into two types. The first is "contraband *per se*," which are objects that are inherently unlawful to possess, such as cocaine and other illegal narcotics. "[O]ne cannot have a property right in that which is not subject to legal possession." *City of Greenwood*, 904 F.2d at 304-05. For contraband *per se*, no forfeiture action need be filed for the government to retain the items; the government owns the items upon seizure. *United States v. 37.29 Pounds of Semi-Precious Stones*, 7 F.3d 480, 485 (6th Cir. 1993).

Derivative contraband, on the other hand, are items that are not inherently unlawful but become unlawful

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items in this court, this court will operate under its equitable power in determining whether the property should be returned.

based upon the use(s) to which to which they have been put. An automobile used in furtherance of a felony is the paradigm example of derivative contraband. *See, e.g., One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699-700 (1965). Derivative contraband may only be forfeited pursuant to a statute, and such statutory forfeitures require notice and an opportunity to be heard. *See Degen v. United States*, 116 S. Ct. 1777, 1780 (1996); *United States v. James Daniel Good Real Property*, 510 U.S. 43, 48-62 (1993). Absent statutory authority for the forfeiture of derivative contraband, it must be returned, as there is no authority for the continued detention of the item by the government. *United States v. Wilson*, 540 F.2d 1100, 1104 (D.C. Cir. 1976). Statutory authorization for the forfeiture of counterfeit paraphernalia is found in 18 U.S.C. § 492.

Consequently, the question that must be resolved is as to whether the Boggs Bills[4] are either contraband per se, derivative contraband or non-contraband. In *Boggs v. Bowron*, this court expressly stated that "[n]o determination has been made as to whether any items within the portfolio [the samples from Wyoming] constitute contraband." *Boggs v. Bowron*, 842 F. Supp. at 561 n.42 At that time, such a decision would have been premature, as no final determination has been reached as to whether plaintiff would be prosecuted. Now that the United States Attorney has decided not to prosecute in either jurisdic-

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[4] The government has already agreed to return all of the "non-contraband" items seized in Pittsburgh. *See* Letter from Charles F. Flynn, Assistant United States Attorney, to Kent A. Yalowitz, Esq. (April 14, 1995). Plaintiff's counsel, on the other hand, is "of the view that all of the property seized must be viewed as a whole in any civil forfeiture action . . ." Letter from Kent A. Yalowitz to Charles F. Flynn (March 9, 1995). As the only item(s) contested in this action are the Boggs Bills that the Secret Service claims are contraband, the court will limit its analysis to those items.

tion, the court will consider whether the Boggs Bills are contraband and therefore automatically forfeited to the government, or should be returned to the plaintiff. For reasons that will become apparent below, this court will analyze the samples seized in Cheyenne separately from those seized in Pittsburgh.

1. The Cheyenne Boggs Bills

In *Boggs v. Bowron*, this court had the opportunity to examine the fifteen samples that Boggs relinquished in Wyoming. The court found that those Boggs Bills were in "the general pattern of general currency, including portraits in the middle, federal reserve seals and numbers, treasury seals and numbers, signature blocks and numeric features, in the size and color similar to genuine currency." *Boggs v. Bowron*, 842 F. Supp. at 561. The court further concluded "that a jury would be justified, if not compelled, to find that these items were in the likeness and similitude of genuine United States currency." *Id.*

These conclusions from *Boggs v. Bowron* are binding on the court in the instant case. Having determined that a jury would be compelled to find that the fifteen Cheyenne Boggs Bills violate 18 U.S.C. § 474, para. 5, which proscribes the possession or custody of items made or executed after the similitude of United States obligations, the court must now rule that those bills are contraband *per se*. Counterfeit bills are among the most obvious forms of contraband as their mere possession, without more, is unlawful. *See 37.29 Pounds of Semi-Precious Stones*, 7 F.3d at 485. The instant case is precisely the type of situation that the contraband *per se* forfeiture rule is intended to address. If mere possession of an item is a crime, the government's return of that item would make the recipient a criminal, and a court cannot enter an order that would lead to such a result.

Based upon its factual conclusions from *Boggs v. Bowron*, this court must now hold that the fifteen Boggs Bills seized in Cheyenne are contraband *per se*. Consequently, they are hereby forfeited to the United States without forfeiture procedures.

2. The Pittsburgh Boggs Bills

This court may not rely on the holding in *Boggs v. Bowron* to conclude that the Boggs Bills[5] seized in Pittsburgh are contraband, as these bills had not been previously examined by this court. As explained in Part II.A.2., the Boggs Bills are sufficiently unique such that individual determinations as to whether they violate 18 U.S.C. §§ 474, 481, 504 and 31 C.F.R. § 411.1 are required. The Secret Service contends that this court's examination of the seized items "would lead the Court to conclude from its own observation that the reproductions are in the likeness and similitude of genuine United States currency." Defendants' Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment at 4. Defendants, in their briefing of this matter, "invited" this court to examine the Boggs Bills and rule on the basis of its own observations. The court "accepted" this "invitation," and conducted an *in camera* review of all of the Pittsburgh materials on October 23, 1997.

Having examined all of the disputed Boggs Bills seized in Pittsburgh (Exhibits B, C, and D from Defendant's In Camera Submission and Declaration of Counterfeit Spe-

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[5] A few of the items seized in Pittsburgh were not actual "bills", but rather "novelty items," including calculators, air fresheners and a bow tie. These items were also inspected to determine whether they violated the applicable counterfeiting statutes. For the purpose of convenience, they will be referred to under the general heading of "Boggs Bills."

cialist Richard L. Outland), this court concludes that all of the items that the Secret Service contends are contraband are, to this court's satisfaction, reproductions of genuine currency of the United States or reproductions of genuine foreign currency. Each are in the likeness and similitude of genuine currency and therefore in violation of 18 U.S.C. §§ 472 or 481. Each reproduction has the general design and appearance of genuine United States or foreign currency. None of the pieces in dispute meet the size and coloration exemptions of 18 U.S.C. § 504 and 31 C.F.R. 411.1. This court is therefore compelled to hold that items 1, 2 and 56 of the 81 reproductions of item 5 in Exhibit B are contraband; that items 1, 2, 3, 4, 5, and 6 in Exhibit C are contraband; and that items 1, 4, 5, 8, 13-16, 18, 19, 22-24 and the novelty items (except the oversize $2 note) from Exhibit D are contraband. These items are therefore forfeited to the United States without the necessity of forfeiture procedures.

A separate order shall issue this day.

/s/ Royce C. Lamberth
ROYCE C. LAMBERTH
United States District Judge

DATE: 10-29-97

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-5313

Filed February 3, 1999

J.S.G. BOGGS,

Appellant

v.

ROBERT E. RUBIN, Secretary of the Treasury, *et al.*,

Appellees

BEFORE: Ginsburg, Sentelle and Rogers, *Circuit Judges*

ORDER

Upon consideration of appellant's petition for rehearing filed December 14, 1998, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

MARK J. LANGER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment provides in part:

   Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

2. The Fifth Amendment provides in part:

   No person shall be . . . deprived of life, liberty, or property without due process of law . . . .

3. 18 U.S.C. § 474(a) (1994 & Supp. II 1996) provides in part:

   § 474. Plates or stones for counterfeiting obligations or securities

   (a) * * * *

   Whoever has in his possession or custody, except under authority from the Secretary of the Treasury or other proper officer, any obligation or other security made or executed, in whole or in part, after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same; or

   Whoever prints, photographs, or in any other manner makes or executes any engraving, photograph, print, or impression in the likeness of any such obligation or other security, or any part thereof, or sells any such engraving, photograph, print, or impression, except to the United States, or brings into the United States, any such engraving, photograph, print, or impression, except by direction of some proper officer of the United States—

Is guilty of a class B felony.[1]

4. 18 U.S.C. § 504 (1994 & Supp. II 1996) provides in part:

> **§ 504. Printing and filming of United States and foreign obligations and securities**
>
> Notwithstanding any other provision of this chapter, the following are permitted:
>
> (1) the printing, publishing, or importation, or the making or importation of the necessary plates for such printing or publishing, of illustrations or—
>
> (A) postage stamps of the United States,
>
> (B) revenue stamps of the United States,
>
> (C) any other obligation or other security of the United States, and
>
> (D) postage stamps, revenue stamps, notes, bonds, and any other obligation or other security of any foreign government, bank or corporation.
>
> Illustrations permitted by the foregoing provisions of this section shall be made in accordance with the following conditions—
>
> (i) all illustrations shall be in black and white . . . ;
>
> (ii) all illustrations . . . shall be of a size less than three-fourths or more than one and one-half, in linear dimension, of each part of any matter so illustrated which is covered by

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[1] A Class B felony is punishable by up to 25 years in prison. 18 U.S.C. § 3581(b)(2).

subparagraph (A), (B), (C), or (D) of this paragraph . . . ; and

(iii) the negatives and plates used in making the illustrations shall be destroyed after their final use in accordance with this section.

The Secretary of the Treasury shall prescribe regulations to permit color illustrations of such currency of the United States as the Secretary determines may be appropriate for such purposes.[1]

* * * *

[1] Regulations promulgated at 31 C.F.R. Part 411 permit color illustrations of money so long as the size limitations of 18 U.S.C. § 504 are met.